

ESTATE OF RICHARD EVANS WALKER

IBIA 83-27

Decided October 28, 1983

Appeal from a February 4, 1983, order denying petition for rehearing issued by Administrative Law Judge Sam E. Taylor in Indian probate numbers IP TU 36 P 82 and IP OK 95 P 83.

Reversed and remanded.

1. Regulations: Publication

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

2. Regulations: Binding on the Secretary--Regulations: Force and Effect as Law

Duly promulgated regulations have the force and effect of law and are binding upon the Department.

3. Administrative Procedure: Administrative Law Judges--
Administrative Procedure: Hearings--Indian Probate: Hearings:
Notice--Notice: Generally

The failure of an Administrative Law Judge to give proper notice of an Indian probate hearing will be held to excuse a party's failure to attend the hearing and to present evidence.

APPEARANCES: Katie E. Walker, pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On April 4, 1983, the Board of Indian Appeals (Board) received a notice of appeal filed by Katie E. Walker (appellant), pro se. The appeal was taken from a February 4, 1983, order issued by Administrative Law Judge Sam E. Taylor, which denied appellant's petition for rehearing in the estate of Richard Evans Walker (decendent). Appellant sought rehearing in order to participate in the distribution of decendent's estate. The petition was denied on the grounds that the specific relief requested was legally impermissible. For the reasons discussed below, the Board reverses the February 4 order and remands the matter to the Administrative Law Judge for consideration of appellant's arguments.

Background

As the result of an automobile accident near Toppenish, Washington, Richard Evans Walker, an unallotted Sac and Fox-Otoe, died intestate and possessed of Indian trust or restricted property on September 9, 1981, at the age of 18. He was survived by his parents, nine brothers and sisters, and four grandparents.

On October 8, 1982, the Administrative Law Judge issued a notice setting November 10, 1982, as the date for a hearing to consider the claims of decedent's creditors and to determine his heirs. The notice read: "All persons having an interest in the estate of the above named decedent, and all creditors having claims against said estate are hereby notified to be present at the hearing and furnish such evidence as they desire." A separate memorandum, signed by the Administrative Law Judge and included with the notice, stated:

Enclosed is a Notice of Hearing. It will NOT be necessary for anyone to appear at the hearing. Subsequent to the hearing and based on the written deposition or previous testimony of one or more of the interested parties, herein, an order will be issued determining the decedent's heirs and/or devisees, their respective share of the estate and approving decedent's will and any claims filed against the estate. A copy of such order together with a notice setting forth your rights of appeal will be mailed to all persons listed on the enclosed notice.

If you have any questions regarding the matter, contact this office prior to the time of the hearing.

On November 10, 1982, the Administrative Law Judge held the hearing as scheduled in the October 8, 1982, notice. Because no one appeared at the hearing, the Administrative Law Judge opened and closed the proceedings summarily:

ADMINISTRATIVE LAW JUDGE SAM E. TAYLOR:

This is the time and place set for the hearing in the estate of Richard Evans Walker. There being no appearances at this time, and having before me a Deposition on Written Interrogatories completed by Richard Eugene Walker, Father of the decedent, on August 24, 1982, I do hereby admit such Deposition on Written Interrogatories into the record to be made a part hereof. The matter will be disposed of on the basis of said deposition.

(Tr. 1).

An Order Determining Heirs was issued on November 23, 1982, in which decedent's parents, Richard Eugene Walker and Geneva C. McKinney, were found to be his heirs and were each awarded one-half of his estate. The order noted that no claims had been filed against the estate. Notice of this decision and of the right to request a rehearing was served on all interested parties.

A petition for rehearing was filed on January 22, 1983, by Jamie Walker, decedent's sister. She asserted that decedent's paternal grandmother, appellant here, should be awarded part or all of decedent's estate because she had been decedent's guardian most of his life and had provided for his care.

On January 27, 1983, appellant filed a similar petition, asserting that she had had legal custody of decedent since October 29, 1969, except for a short period during which an unsuccessful attempt was made to return decedent to his mother's custody, and had reared him in her home, buying his food, clothing, and other necessities. Appellant further explained that although she had received notice of the hearing into decedent's estate, she had not attended the hearing in reliance upon the attached memorandum. She requested that she be awarded the mother's share of decedent's estate so that she could provide care for decedent's sister, Angela, over whom she also had legal custody.

The Administrative Law Judge denied both petitions in an order dated February 4, 1983. He stated that the specific relief sought, appellant's being awarded part or all of decedent's estate, was precluded by Oklahoma law. He noted that under 84 OS 213(2), "[i]f the decedent leaves no issue, nor husband, nor wife, the estate must go to the father or mother, or if he leaves both father and mother, to them in equal shares." Accordingly, the Administrative Law Judge affirmed the November 23, 1982, Order Determining Heirs.

Appellant's notice of appeal from the February 4 order was received by the Board on April 4, 1983. In addition to the issues raised before the Administrative Law Judge, appellant contends that she has been denied the opportunity to be heard regarding her claims against the estate. No briefs were filed in response to the Board's notice of docketing.

Discussion and Conclusions

Appellant's petition for rehearing asked that she be awarded the mother's share of decedent's estate. The Administrative Law Judge explained, in his order denying rehearing, that this relief was not possible because it was contrary to the Oklahoma laws of intestate succession. On appeal, appellant has recharacterized her request as a claim against decedent's estate.

A strictly literal reading of appellant's petition and notice of appeal would find that she is impermissibly seeking to raise new issues for the first time on appeal and would consequently hold that her notice of appeal should be dismissed. See, e.g., White Sands Forest Products, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 299, 90 I.D. 396 (1983); Burns v. Anadarko Area Director, 11 IBIA 133 (1983). However, the Board finds that appellant is, on appeal, as she was in her petition to the Administrative Law Judge, merely seeking to discover how to present her arguments to the Department. Under normal circumstances, these arguments would have been presented at the hearing into decedent's estate and the problems resolved prior to a determination of decedent's heirs and of claims against his estate.

Appellant attempted to present her arguments under two alternative characterizations. First, she sought to participate in decedent's estate as an heir. As the Administrative Law Judge noted, the determination of decedent's heirs was governed by the provisions of Oklahoma law, in accordance with 25 U.S.C. § 348 (1976). Whether the parental rights of decedent's parents had been terminated by court order or whether appellant was decedent's legal guardian, are questions of fact. The legal significance of those facts, if any, in relation to the distribution of decedent's estate, is a question of law under the Oklahoma intestate succession laws. It is not clear whether the Administrative Law Judge considered this specific argument.

Appellant next sought a finding that she had a valid claim for \$60 a year for each of 12 years during which she was decedent's legal guardian, for a total of \$720. Claims against a deceased Indian's trust estate are governed by regulations set forth in 43 CFR 4.250-.252. Under 43 CFR 4.250(a),

[a]ll claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under § 4.211(c) [as was appellant,] shall be filed with either the Superintendent or the administrative law judge prior to the conclusion of the first hearing, and if they are not so filed, they shall be forever barred.

Section 4.250(c) provides that "[c]laims of individual Indians against the estate of a deceased Indian may be presented in the manner set forth in paragraph (b) of this section [relating to claims of non-Indians and providing for claims to be presented in writing, in triplicate, and with supporting affidavits,] or by oral evidence at the hearing where the claimant shall be subject to examination under oath relative thereto." Finally, subsection (d) states that "[c]laims for care may not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected."

As mentioned, under normal circumstances, appellant could have presented these arguments to the Administrative Law Judge at the hearing as alternative claims. This is the procedure contemplated under the probate regulations. Among other regulations intended to ensure that all persons have an opportunity to present claims against a decedent's estate or show that they should be heirs, 43 CFR 4.212(a) provides that "the notice [of hearing] * * * shall inform all persons having an interest in the estate of the decedent, including persons having claims or accounts against the estate, to be present at the hearing or their rights may be lost by default." The notice sent to appellant in this case informed her only that she should be present to furnish such evidence as she desired, and then specifically and emphatically stated that she need not attend the hearing. The notice did not set forth the potential consequences of failure to present evidence of heirship or claims before the conclusion of the hearing.

[1, 2] It is true that all persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations. Estate of Eugene Patrick Dupuis, 11 IBIA 11 (1982). It is equally true that such duly promulgated regulations have the force and effect of law and are binding upon

the Department. Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146 (1983); Aleutian/Pribilof Islands Ass'n, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).

[3] In this case, the Administrative Law Judge was required by 43 CFR 4.212 to inform appellant of the potential consequences of her failure to appear at the hearing and to present evidence on her own behalf. The Administrative Law Judge failed to inform appellant and other parties that evidence not presented before or at the hearing might be later barred. Even though this requirement is embodied in regulation, appellant's failure to attend the hearing and to present her arguments to the Administrative Law Judge directly resulted from the Administrative Law Judge's failure to provide proper notice of the hearing.

The Board declines to condone the Department's violation of its own regulations. Therefore, although appellant would have been barred from raising these issues if she had determined on her own not to attend the hearing, the intervention of error committed by the Administrative Law Judge will be held to excuse appellant's error in this case. The Board takes this action under the inherent authority of the Secretary to correct manifest error or injustice. 43 CFR 4.320.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 4, 1983, order denying petitions for rehearing in this estate is reversed and the matter is remanded to the Administrative Law Judge for consideration of appellant's arguments, both as they seek a share in decedent's estate as an heir and as a person with a claim against the estate. The decision of the Administrative Law Judge on remand will be final unless appealed in accordance with the provisions of 43 CFR 4.241 and 4.320.

Jerry Muskrat
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Franklin D. Arness
Administrative Judge